No. [redacted] 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958 9

DANIEL J. SENTILLES,

Petitioner,

v.

INTER-CARIBBEAN SHIPPING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CITATIONS

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Petitioner, Daniel J. Sentilles, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Southern District of Florida. The District Court judgment had been entered in favor of the Petitioner pursuant to a jury verdict resulting from his seaman's suit for personal injuries.

OPINIONS OF THE LOWER COURTS

No opinion was rendered by the trial court.

The majority and dissenting opinions of the Fifth Circuit Court appear in the Appendix annexed hereto, pp. 4 - 7, and also can be found in the certified transcript of record filed herewith (R. 211-217)[1]. These opinions are reported in 256 F. 2d 156.

JURISDICTION OF THIS COURT

The judgment presented for review was dated and entered June 9, 1958 by the U. S. Court of Appeals for the Fifth Circuit. On July 16, 1958 that court denied the present Petitioner's request for rehearing, with one judge dissenting from such denial.

This court has jurisdiction to review the judgment complained of by writ of certiorari, 28 U.S.C. Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. In establishing a prima facie causal relationship between an accident and subsequent acute tuberculosis, is the plaintiff-seaman required to adduce medical testimony which excludes every other possible cause of his condition?

2. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman, reverse that judgment by resolving evidentiary conflicts *against* the plaintiff-seaman?

3. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman, ignore medical testi-

[1] Numerals following the "R" designation refer to pages contained in the transcript of record.

mony which clearly presented a jury question and reverse the judgment for alleged failure of medical proof?

4. Can a federal appellate court, after a jury verdict and judgment for plaintiff-seaman in a personal injuries action, enter judgment for the defendant where (a) at pre-trial conference counsel for the defendant admitted that the plaintiff sustained *some* injury and (b) undisputed testimony established at least *some* injury.

STATUTE INVOLVED

THE JONES ACT

41 Stat. 1007

46 U.S.C.A. Section 688—Recovery for injury to or death of seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in

such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

History

The Petitioner initiated his suit for personal injuries in a state court. The Respondent had the cause removed to the United States District Court for the Southern District of Florida. The amended complaint asked for money damages arising from personal injuries sustained as a result of the Respondent's negligence and or failure to provide a seaworthy vessel. The Petitioner also asked fo maintenance and cure. (R. 5-9). The Respondent denied all allegations of negligence, unseaworthiness, proximate cafusation, and damages (R. 10-12).

The cause proceeded to trial and resulted in a jury verdict and judgment in Petitioner's favor (R. 22-23). The Respondent took an appeal from the judgment to the United States Court of Appeals for the Fifth Circuit (R. 203). The sole question involved on appeal was the sufficiency of evidence to establish that the disabling illness of the Petitioner was caused by his shipboard accident (R. 213). The Court of Appeals reversed the lower court judgment and entered judgment for the Respondent, holding that the Petitioner had failed to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard" (R. 216). Judge Rives dissented from the majority opinion (R. 216).

The Court of Appeals denied rehearing, with Judge Rives dissenting once more, and this Petition followed (R. 236).

Facts

The Petitioner was an engineer on the Respondent's ship S.S. Montego when the accident occurred (R. 151). In April, 1953, the ship encountered very rough weather on its voyage from Santa Marta, Colombia to Miami (R. 31). The vessel tossed and pitched through 25-30 mile-an-hour winds and twenty foot waves (R. 32, 35, 41). The Petitioner was crossing the deck when the ship "took a very heavy sea and fell away", leaving him suspended in the air (R. 154). He fell to the deck on his left side, hitting his head, shoulder and ribs (R. 35, 36, 158). A wave washed him twenty-four feet along the deck, into the chains around the edge of the ship (R. 154, 157). His skin was scraped and scratched by the deck, his shirt and trousers were torn, and he inhaled some sea water (R. 158, 160).

The Petitioner complained of pain in his head and side after the fall (R. 35). A day or two thereafter he developed a cough and pain in his chest (R. 39, 40). He felt as though he had the flu, and was treated aboard ship for a "heavy cold" (R. 39, 161). Although he had felt well and had no cough before the accident, he was described by the ship's captain as a "pretty sick man" with persistent chest complaints when the ship reached Miami three or four days afterward (R. 37, 39, 40, 161). About ten days later the Petitioner saw Dr. Fischbach (R. 161). A potential diagnosis of tuberculosis was made at that time (R. 50). The Petitioner returned home to New Orleans and was hospitalized and treated for "very acute" tuberculosis (R. 109).

Dr. Charbonnet had been the Petitioner's treating

physician since 1935. He examined the Petitioner in the months of May, July, August, September and October of 1952 and found *no* evidence of tuberculosis (R. 54). An examination as late as February 1953, *two months before the accident*, revealed no chest difficulties of any kind (R. 53).

The Petitioner's chest was X-rayed in June, 1950. The X-ray taken at that time showed a small, scarred, *inactive* area in the left mid-lung field (R. 94). An X-ray taken in May, 1952 gave no evidence of tuberculosis (R. 54). A third X-ray, taken about a month after the Petitioner fell, showed a cavity in the left lower lung field, with a fluid level and marked peripheral reaction (R. 90).

Additional medical testimony established that inactive tuberculosis is often present in a person, and that a blow to the chest can reduce the body's ability to fight off the tubercular bacilli (R. 71, 117, 118). It was further stated that the Petitioner's accident could have had the effect of flaring up a previously inactive disease process, and that a severe blow to the chest can cause an active and rapid spread of tuberculosis from an inactive or latent source (R. 94, 99). Against this general medical background, specific and far more significant medical testimony was offered for the jury's consideration. Since that testimony is the crux of the Petitioner's argument, it will be presented therein to avoid seemingly needless repetition.

ARGUMENT

1. *The opinion of the federal appellate court is, per se, clear proof that the court demanded medical testimony which excluded every possible cause of Petitioner's condi-*

tion other than his fall, in direct contravention of all law on the subject.

It will be conceded, as stated in the Court of Appeals' majority opinion, that the Petitioner, in submitting the items of damage relating to tuberculosis, was required to prove that "the aggravation of his tubercular condition was probably caused by the incident on shipboard". (R. 216). Referring again to that opinion, the following will be found (R. 215):

> "The appellee called as one of his witnesses, Dr. Seymour B. London, who had never examined the appellee. He testified, basing his opinion on the testimony of the other doctors given by deposition, that he thought the fall *probably* aggravated the appellee's condition. But he admitted that there were other factors which *might* have caused the aggravation of the tuberculosis and he had no way of telling which, and that it *might* have been any one or all of them". (emphasis supplied).

The foregoing quotation, in and of itself, shows that the appellate court did not apply the proper evidentiary test in determining whether or not the Petitioner (appellee) had presented a prima facie case. Obviously the appellate court decided that the medical testimony that Petitioner's fall *probably* aggravated his tubercular condition was not enough. The court's opinion also required that he prove that *no other factor could possibly have had the same result*. Such an evidentiary burden is unheard of in a civil suit, and surpasses even the reasonable doubt requirement of criminal prosecution.

In *Pan American Casualty Co. v. Reed*, 5th Cir., 240 F.2d 336, 339, the same Circuit Court, in considering the problem of medical causation, properly held:

> "There is no dispute over the principles that govern the submission of such an issue to a jury. It is incumbent on one seeking a recovery to present probative facts from which, standing alone or forming the basis of expert testimony, the causal relation can reasonably be inferred. *** The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. Galloway v. United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 87 L. Ed., 1458".

The above-quoted was written in 1957, and was entirely in accord with the law relating to the probative burden on medical causation, and in accord with the United States Supreme Court case which it cited, *supra*. The opinion under attack, written one year later, is in conflict with every federal decision relating to expert opinion evidence.

2. *Assuming, arguendo, that there were conflicts in Dr. London's testimony, the federal appellate court had no right to resolve those conflicts in the Respondent's favor, contrary to the jury verdict and judgment below.*

On at least three separate occasions Dr. London testified that the Petitioner's accident probably aggravated his tuberculosis and that "the trauma to the chest was the precipitating factor" of his advanced tubercular state (R. 75, 141, 143). Dr. London also stated, as noted by the fed-

eral appellate court, that there were other factors which might have caused the aggravation of the tuberculosis and he had no way of telling which, and that it might have been any one or all of them (R. 215). Reading this later statement in conjunction with *all* of the doctor's testimony leaves the decided impression that the doctor was merely recognizing the fallibility of informed medical opinion (R. 68-83, 130-145). His resultant inability to state *with certainty* that the Petitioner's fall was the *sole* cause of his impairment does not actually appear in conflict with his testimony that the fall was probably the responsible factor. Assuming, however, that such a conflict exists, it was clearly the province of the jury to resolve that conflict in the Petitioner's favor.

In *Liberty Mutual Insurance Co. v. Thompson*, 5th Cir., 171 F.2d 723, 726, the court held:

> "Moreover, it is the function of the jury, if it sees fit, to reconcile the testimony of any witness who has made inconsistent statements, or to believe only such parts of his evidence as it deems worthy of belief; and the jury is not required to reject the entire testimony of any witness merely because there are conflicts therein. . . .
>
> "Finally, the jury is the sole judge of the credibility of the witnesses and of the weight or value of their testimony. In actions at law in the federal courts, where the evidence is such that reasonable men may fairly differ . . . the right of trial by jury is preserved by the Seventh Amendment, 'and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'.

> This means that an appellate federal court should not disturb the jury's finding of fact as to the accidental cause of appellee's disease if on the trial there was any substantial evidence to support it. This is so, even though the appellate judges may not believe the fact so found to be true, since an appellate court has no constitutional right to express an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury."

It is implicit in the opinion under attack that the Court of Appeals completely ignored the above-quoted and determined, as a matter of law, that the jury *was not entitled to believe* Dr. London when he stated that the accident and the disease were causally related. The federal appellate court chose to usurp the jury's function and reweigh the credibility of the witness and the weight of his testimony. Such action has never been condoned by this court. *Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520, Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 504, 77 S. Ct. 443, 447, 1 L. Ed. 2d 493, Webb v. Illinois Central Railroad Co., 352 U.S. 512, 77 S. Ct. 451*

We do not contend that the jury could not properly have reached the same conclusion as the appellate court. However, Dr. London's testimony was also reasonable support for the jury verdict in Petitioner's favor, and the decision was exclusively for the jury to make. The very essence of the jury's function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 504, 77 S.Ct. 443, 447, 1 L. Ed. 2d 493.*

The federal appellate court's interference with the jury's verdict deprived the Petitioner of the fundamental right to jury trial guaranteed him by the Jones Act, the Constitution of the United States, and the decisions of this Court.

3. *The federal appellate court ignored other medical testimony which clearly presented a prima facie case.*

The majority opinion of the court below also considered the testimony of Dr. Jacobs, which was offered at trial by the Petitioner (R. 214):

> "Dr. Jacobs, who treated the appellee at the United States Public Health Hospital, testified that dormant tuberculosis could be activated and aggravated by 'anything that weakens the body, whether it be a physical blow, a disease like diabetes, nutritional disturbance such as starvation or vitamin deficiency, perhaps even a severe emotional disorder can reduce the ability of the body to fight off the effects of tubercular bacilli.' At the time Dr. Jacobs saw the appellee at the hospital the appellee was 'very much agitated' and 'very much disturbed about a number of things.' Either diabetes or trauma, he stated, or a combination of the two could have aggravated the appellee's preexisting tubercular condition. He told of a study made by him of diabetes and tuberculosis and testified 'that people with diabetes are inordinately susceptible to developing tuberculosis, perhaps one to five times as great as the general population'."

We will not waste this court's time by discussing the unfairly slanted recapitulation above-quoted. However, the appellate court's failure even to mention portions of Dr. Jacobs' testimony which were favorable to the Petitioner cannot be similarly passed over.

The doctor stated that traumatic aggravation of tuberculosis is demonstrable anywhere from a few days up to three months after the injury, and that the Petitioner's case history was in conformity with that time pattern (R. 117-118). In addition Dr. Jacobs testified (R. 129):

> "Q. You have stated that the blow of the chest and diabetes, in your opinion, in this case were both contributing causes to the activation of the preexisting, dormant condition, is that correct?
> "A. Yes, sir."

Obviously the appellate court either decided to ignore the above testimony, or chose to disbelieve it, or again decided that the Petitioner must prove that his fall was the *sole cause* of tubercular aggravation. Under the authorities, recovery is not limited to those instances where a given injury is the sole cause of the resulting impairment. The wrongdoer must take the injured party as he finds him, and the concurrence of injury and disease does not defeat recovery for the consequent impairment. *Horn v. Moran Towing & Transportation Co., Inc., 2nd Cir., 138 F.2d 900, 902. Hiltz v. Atlantic Refining Co., 3rd Cir., 151 F.2d 159, 161.*

In its appraisal of the foregoing testimony the Court's attention is directed to a recent decision which held that under the Jones Act "the test of a jury case is simply

whether the proofs justify with reason the conclusion that employer negligence played any part; even the slightest, in producing the injury or death for which damages are sought." *Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 523, 77 S.Ct. 457, 458.*

4. *In view of the Petitioner's other undisputed injuries the appellate court had no right to enter judgment for the Respondent.*

We shall assume, arguendo, that the federal appellate court was correct in holding that the Petitioner had failed to establish causal connection between the accident and his tuberculosis. Even then the appellate court's entry of judgment for the Respondent, contrary to the jury's verdict, was improper.

The record affirmatively shows that counsel for the Respondent admitted at pre-trial conference that the Petitioner had sustained *some* injury as a result of the incident on shipboard (R. 13). Undisputed testimony established that the Petitioner sustained injuries totally unrelated to his chest. These included a pain in his head (R. 35), skin scratches on his left hip and leg (R. 158), and immersion in and inhalation of sea water (R. 154, 160).

The appellate court had no right to completely ignore even these minor undisputed injuries, and enter judgment for the Respondent.

CONCLUSION

For the reasons advanced by all the foregoing, this Court is respectfully requested to grant a writ of certiorari herein.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16776

INTER-CARIBBEAN SHIPPING CORPORATION

Appellant,

versus

DANIEL J. SENTILLES,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

(June 9, 1958)

Before, RIVES, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant, Inter-Caribbean Shipping Corporation, owned the S. S. Montego which it operated for the importation of bananas into

the United States from South American ports. Daniel J. Sentilles, the appellee, described himself as a marine engineer specializing in refrigeration. He was employed by the appellant to operate or supervise the operation of the Montego. He was responsible for the employment of the captain of the vessel. In April of 1953 the vessel was bringing a cargo of bananas from Santa Marta, Colombia, to Miami, Florida. Prior to the voyage the appellee signed on as a member of the crew in the capacity of chief engineer. The sea had been heavy from the time the ship left Santa Marta. During the second or third day out, and while the appellee was crossing the deck, the vessel fell away from him. He fell and slid, or was washed by a wave, some distance into the protective chain around the edge of the ship. He didn't know exactly, but imagined he inhaled some water. The day following or the second day after this incident the appellee developed a cough and felt like he had the flu. Although he spent quite a bit of time in his bunk, he made the usual inspections of equipment. He complained of head and chest colds until the ship reached Miami two or three days later.

The appellee left the ship when it reached Miami. About ten days later he was in New York where, his cold persisting, he consulted a doctor who told him, the appellee, he was a sick man and should be hospitalized for further checking. Appellee went to New Orleans and went into a hospital. There he contacted Dr. Charbonnet who had treated the appellee off and on for almost twenty years. The doctor made an examination including X-rays. Dr. Charbonnet called in Dr. LeDoux, a specialist in internal medicine with considerable experience in connection with chest diseases and tuberculosis. Dr. LeDoux

made an examination. The discovery was there made that the appellee, who had been a diabetic for some years, then had active pulmonary tuberculosis. He transferred to the United States Public Health Service Hospital in New Orleans where he was treated for diabetes and tuberculosis. He was discharged from this hospital to out-patient status on November 18, 1953. In October, 1956, the appellee sued Inter-Caribbean Shipping Corporation, the owner of the Montego, claiming $75,000 damages as a result of his injuries, and for maintenance and cure. An unseaworthy vessel and negligent opperation of it were alleged. A jury trial was had. The appellant moved for a directed verdict at the close of the appellee's testimony and again at the close of all the testimony. Both motions were denied. A verdict for appellee in the amount of $20,000 was returned upon which judgment was entered. The appellant moved the court to set aside the judgment and enter judgment notwithstanding the verdict and, in the alternative, for a new trial. The motion was denied. This appeal followed. The sole question argued is whether there was sufficient evidence that the disabling illness of the appellee was caused by the occurrences on the S.S. Montego.

Testimony by deposition of four doctors who had treated or examined the appellee was introduced on his behalf. Dr. Charbonnet had known and treated the appellee over a period of about eighteen years. His testimony disclosed a record of a number of past illnesses of the appellee including jaundice, hepatitis and bronchial pneumonia. He was consulted by the appellee when the appellee reached New Orleans after being in New York. From the report of the appellee's New York doctor Dr. Charbonnet learned that the appellee had a lung condition.

Dr. Charbonnet was not, as he put it, "in that particular line" and would leave the diagnosis to Dr. LeDoux, the expert consulant whom he called in. Dr. LeDoux saw the appellee approximately twenty-four times while the appellee was at the Hotel Dieu Hospital. He found that the appellee then had pulmonary tuberculosis which apparently had been present for a year or nearly so at the time he was admitted to the hospital and that symptoms of tuberculosis had existed for about eight months. The doctor thought the X rays indicated the possibility of a tubercular condition as early as 1950 and that it was clearly so in June, 1952. A light blow on the chest he testified "would be unlikely to spread the disease, whereas a severe blow would be certainly more likely". So also, he said, tuberculosis can be aggravated by diabetes. Dr. Jacobs, who treated the appellee at the United States Public Health Hospital, testified that dormant tuberculosis could be activated and aggravated by "anything that weakens the body, whether it be a physical blow, a disease like diabetes, nutritional disturbance such as starvation or vitamin deficiency, perhaps even a severe emotional disorder can reduce the ability of the body to fight off the effects of tubercular bacilli." At the time Dr. Jacobs saw the appellee at the hospital the appellee was "very much agitated" and "very much disturbed about a number of things." Either diabetes or trauma, he stated, or a combination of the two could have aggravated the appellee's preexisting tubercular condition. He told of a study made by him of diabetes and tuberculosis and testified "that people with diabetes are inordinately susceptible to developing tuberculosis, perhaps one to five times as great as the general population."

The appellee called as one of his witnesses, Dr.

Seymour B. London, who had never examined the appellee. He testified, basing his opinion on the testimony of the other doctors given by deposition, that he thought the fall probably aggravated the appellee's condition. But he admitted there were other factors which might have caused the aggravation of the tuberculosis and he had no way of telling which, and that it might have been any one or all of them.

The rule as to the medical testimony respecting causation which is required to take a case to a jury has been thus stated:

> "It appears to be well settled that medical testimony as to the possibility of a causal relation between a given accident or injury and the subsequent death or impaired physical or mental condition of the person injured is not sufficient, standing alone, to establish such relation. By testimony as to possibility is meant testimony in which the witness asserts that the accident or injury 'might have', 'may have', or 'could have' caused, or 'possibly did' cause the subsequent physical condition or death or that a given physical condition (or death) 'might have', 'may have', or 'could have' resulted or 'possibly did' result from a previous accident or injury — testimony, that is, which is confined to words indicating the possibility or chance of the existance of the causal relation in question and does not include words indicating the probability or likelihood of its existence. * * * 135 A. L. R. 516."

The foregoing rule has been stated and applied in *Bowman*

v. Prudential Insurance Co., 10th Cir. 1951, 186 F. 2d 662; and *Chicago Great Western Railway Co. v. Smith*, 8th Cir. 1955, 228 F. 2d 180. And see *New York Life Ins. Co. v. Trimble*, 5th Cir. 1934, 69 F. 2d 849; *Southern Stevedoring Co. v. Henderson*, 5th Cir. 1949, 175 F. 2d 863; *Fort Worth & Denver City Ry. Co. v. Smith*, 5th Cir. 1953, 206 F. 2d 667. The least that the appellee was required to prove was that the aggravation of his tubercular condition was probably caused by the incident on shipboard. The most that he established was that the incident was a possible cause of the aggravation. This was not enough. The motion of the appellant for a directed verdict should have been granted and judgment for it will be here rendered.

REVERSED AND RENDERED.

RIVES, Circuit Judge, Dissenting:

The jury had a right to believe that the appellee was violently knocked down and washed some twenty-four feet along the deck into the chains around the ship. His skin was scratched and scraped on the deck, his shirt ripped open, his khaki pants torn on the seat, his head, shoulder, back, and ribs struck so hard that he thereafter made complaints about them to the Captain. Within a short time he became ill, and within about two weeks his illness was diagnosed as active tuberculosis. Before his injury in April, 1953, the appellee had been examined repeatedly by Dr. Charbonnet throughout the latter part of 1952, and as late as February 1953, two months before

the accident, and Dr. Charbonnet had found no chest difficulties and no reason to suspect tuberculosis.

In reaching their verdict the jurors were not confined strictly to the opinions of the physicians, indeed those opinions were not binding on them. The jury had the right, and was under the duty to take a broader view, and to consider *all* of the facts and circumstances disclosed by the evidence. Upon such a view, I would agree with the district court that there was substantial evidence to support the verdict of the jury. I, therefore, respectfully dissent.